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Second report on the obligation to extradite or prosecute (*aut dedere aut judicare*)

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I. Preface

1. The present report on the obligation to extradite or prosecute (*aut dedere aut judicare*) is the second report prepared by the Special Rapporteur on the topic in question. The preliminary report,[1] presented in 2006, was discussed by the members of the International Law Commission during its fifty-eighth session.

2. Since then, however, although the topic has been formally continued, around half of the members of the Commission have been replaced, as a result of the election held by the General Assembly in November 2006. Therefore, the Special Rapporteur is of the opinion that it is wise, and even necessary, to recapitulate in the present report the main ideas described in the preliminary report, as well as to summarize the discussion that took place both in the Commission and in the Sixth Committee in 2006. The old Latin maxim *repetitio est mater studiorum* seems to be applicable to the present case.

3. Furthermore, since different opinions were expressed by members of the Commission during last year's plenary debate, it seems necessary to obtain the views of the new members on the most controversial matters covered in the preliminary report before proceeding to a substantive elaboration of possible draft rules or articles concerning the obligation to extradite or prosecute. Consequently, in the present report, the Special Rapporteur will try to describe, or to repeat, some of the essential questions for the benefit mainly of the new members of the Commission in order to avoid any possible confusion in the future.

4. It also seems of crucial importance for the further work on the topic in question that a wider response be obtained from States on the issues identified by the International Law Commission in chapter III of last year's report. Up to now, only seven States have transmitted their comments and information concerning those issues.[2] This does not seem to constitute a sufficient basis for the formulation of definite conclusions as to the eventual codification of appropriate rules on the obligation to extradite or prosecute. A repetition of last year's request, to be addressed to States, seems necessary in these circumstances.

II. Introduction

5. At its fifty-sixth session, in 2004, the International Law Commission, on the basis of the recommendation of the Working Group on the Long-term Programme of Work, identified the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" for inclusion in its long-term programme of work. A brief syllabus describing the possible overall structure and approach to the topic was annexed to that year's report of the Commission.[3] In its resolution 59/41, the General Assembly took note of the Commission's report concerning its long-term programme of work.

6. At its 2865th meeting, held on 4 August 2005, the Commission considered the selection of a new topic for inclusion in the Commission's current programme of work and decided to include the topic "The obligation to extradite or prosecute

[1] A/CN.4/571.

[2] See, in detail, A/CN.4/579 and paras. 61-72 below.

[3] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 362. For the syllabus on the topic, see the annex.

(*aut dedere aut judicare*)" on its agenda, and appointed Zdzislaw Galicki as the Special Rapporteur for the topic.[4] In paragraph 5 of its resolution 60/22, the General Assembly endorsed the decision of the Commission to include the topic in its programme of work.

7. It should be recalled that the topic in question appeared in the list of planned topics already at the first session of the Commission in 1949, but was largely forgotten for more than half a century until it was briefly addressed in articles 8 and 9 of the 1996 draft Code of Crimes against the Peace and Security of Mankind.[5] Those articles set out minimum contours of the principle of *aut dedere aut judicare* and the linked principle of universal jurisdiction. It is important to remember that the draft Code was largely a codification exercise of customary international law as it stood in 1996, rather than a progressive development of international law, as confirmed two years later with the adoption of the Rome Statute of the International Criminal Court.

8. In fact, "the obligation to extradite or prosecute" was reflected by the Commission even earlier in article 54 of the draft Statute for an International Criminal Court, adopted at its forty-sixth session in 1994[6] and submitted to the General Assembly as part of the Commission's report on the work of that session. However, the "obligation", as formulated in the 1996 draft Code, seems to be more general and wider than that contained in the earlier 1994 draft Statute.

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[4] Ibid., *Sixtieth Session, Supplement No. 10* (A/60/10), para. 500.

[5] The text of those provisions, as adopted by the Commission at its forty-eighth session, in 1996, and submitted to the General Assembly as part of the Commission's report on its work of that session, was the following:

Article 8. Establishment of jurisdiction. Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in article 16 shall rest with an international criminal court. However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article (*Yearbook of the International Law Commission 1996*, vol. II (Part Two), p. 27).

Article 9. Obligation to extradite or prosecute. Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17, 18, 19 or 20 is found shall extradite or prosecute that individual (Ibid., at p. 30).

[6] *Article 54. Obligation to extradite or prosecute.* In a case of a crime referred to in article 20, subparagraph (*e*), a custodial State Party to this Statute which is a party to the treaty in question but which has not accepted the Court's jurisdiction with respect to the crime for the purposes of article 21, paragraph 1 (*b*) (i), shall either take all necessary steps to extradite the suspect to a requesting State for the purpose of prosecution or refer the case to its competent authorities for that purpose (*Yearbook ... 1994*, vol. II (Part Two), p. 65).

III. Preliminary report revisited: old and new questions for the newly elected members of the International Law Commission

A. Consideration of the topic at the fifty-eighth session of the International Law Commission

9. The preliminary report on the obligation to extradite or prosecute (*aut dedere aut judicare*)[7] was submitted by the Special Rapporteur to the fifty-eighth session of the International Law Commission. It was prepared by the Special Rapporteur as a very preliminary set of initial observations concerning the substance of the topic, marking the most important points for further consideration and including a very general road map for the future work of the International Law Commission in the field.

10. At the fifty-eighth session, the Commission considered the preliminary report of the Special Rapporteur, including the proposed preliminary plan of action.[8] In the debate it was suggested that the scope of the topic should be limited to the objective of the obligation, namely, to reduce cases of impunity for persons suspected of having committed international crimes by depriving them of "safe havens". It was proposed that the topic could be further limited to particular categories of crimes, such as those which were particularly grave and threatened the international community as a whole. It was also suggested that a distinction should be drawn between crimes under international law (defined in treaty instruments), and crimes recognized under international customary law, such as war crimes, genocide and crimes against humanity. There was general support for excluding crimes that were foreseen solely under national laws from the scope of the study.

11. It was observed, in addition, that a more limited form of the obligation existed in regard to treaty crimes. For instance, it was noted that many treaties, including the so-called sectoral conventions for the suppression of international terrorism, contained a more guarded formulation, namely, to submit the case to the competent authorities "for the purpose of prosecution", as opposed to an obligation "to prosecute". It was recalled that Governments typically resisted accepting an obligation "to prosecute" since the independence of prosecution was a cardinal principle in their national criminal procedures.

12. It was suggested that the Commission should focus on gaps in existing treaties, such as the execution of penalties and the lack of a monitoring system with regard to compliance with the obligation to prosecute. As regards the question of the existence of a customary obligation to extradite or prosecute, it was suggested that any such obligation would have to be based on a two-tier system, as in existing treaties, whereby certain States were given priority jurisdiction and other States would be obliged to exercise jurisdiction if the alleged offender was not extradited to a State having that priority jurisdiction.

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[7] A/CN.4/571.

[8] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), paras. 214-232. For the summary of the debate, see especially paras. 220-229, on which this part of the present report is mostly based.

13. Concerning the obligation to extradite, it was pointed out that whether that obligation existed depended on the treaties made between the parties and on the circumstances. In addition, since crimes were typically defined very precisely in domestic laws, the question had to be whether there was an obligation to extradite or prosecute for a precisely defined crime in precisely defined circumstances. It was also noted that most of the complex issues in extradition were solved pragmatically. Some members considered that the obligation to extradite or prosecute had acquired a customary status, at least as far as crimes under international law were concerned. In the terms of a further view, the procedure of deportation was relevant to the topic.

14. Furthermore, it was proposed that the Commission could consider the practical difficulties encountered in the process of extradition, including: problems of the sufficiency of evidence, the existence of outdated bilateral and multilateral treaties and national laws allowing multiple grounds for refusal, limitations on the extradition of nationals and the failure to recognize specific safeguards for the protection of the rights of the extradited individual, particularly in situations where extradition could expose the individual to torture, the death penalty or even life imprisonment. It was also recalled that, in the situation of international crimes, some of the limitations on extradition were inapplicable.

15. Some members cautioned against considering the technical aspects of extradition law. What was specific to the topic and the precise meaning of the Latin maxim *aut dedere aut judicare* was that, failing an extradition, an obligation to prosecute arose. The focus, therefore, should be on the conditions for triggering the obligation to prosecute. The view was expressed that the Commission should not deal with all the collateral rules on the subject, which were linked to it but not necessarily part of it. It was also proposed that the focus should be limited to the elaboration of secondary rules.

16. A general preference was expressed for drawing a clear distinction between the concepts of the obligation to extradite or prosecute and that of universal criminal jurisdiction. It was recalled that the Commission had decided to focus on the former and not the latter, even if for some crimes the two concepts existed simultaneously. It was pointed out that the topic did not necessarily require a study in extraterritorial criminal jurisdiction. If the Commission were, nonetheless, to embark on a consideration of the concept of universal jurisdiction, it was suggested that the different kinds of universal jurisdiction, particularly whether it was permissive or compulsory, be considered. It was also considered worth contemplating whether such jurisdiction could only be exercised when the person was present in a particular State or whether any State could request the extradition of a person from another State on grounds of universal jurisdiction.

17. A suggestion was made that the topic should not include the "triple" alternative, involving the concurrent jurisdiction of an international tribunal, since the existing tribunals had their own *lex specialis* rules. According to another opinion, it would be necessary insofar as possible to favour that third path. It was suggested that the Special Rapporteur should undertake a systematic study of State practice, focusing on contemporary practice, including national jurisprudence.

18. On the question of the final form, while it was recognized that it was premature to consider the matter, a preference was expressed for the eventual formulation of a set of draft articles, although it was noted that if the Commission

were to conclude that the obligation existed only under international treaties, then a draft of a recommendatory nature would be more appropriate.

19. The Special Rapporteur decided, however, that in his second report he would propose — at least provisionally — to start the elaboration of the first provision dealing with the scope of application of future draft articles.

B. Specific issues on which comments of States would be of particular interest to the Commission

20. The Commission included in chapter III of its report on the fifty-eighth session, as usual, a list of specific issues on which comments from States would be of particular interest to the Commission. Among others, issues were identified concerning the obligation to extradite or prosecute (*aut dedere aut judicare*). The Commission declared that it would welcome any information that Governments might wish to provide concerning their legislation and practice with regard to the topic, particularly more contemporary ones. If possible, such information should concern:

(a) International treaties by which a State is bound, containing the obligation to extradite or prosecute, and reservations made by that State to limit the application of this obligation;

(b) Domestic legal regulations adopted and applied by a State, including constitutional provisions and penal codes or codes of criminal procedures, concerning the obligation to extradite or prosecute (*aut dedere aut judicare*);

(c) Judicial practice of a State reflecting the application of the obligation *aut dedere aut judicare*;

(d) Crimes or offences to which the principle of the obligation *aut dedere aut judicare* is applied in the legislation or practice of a State.[9]

The Commission added that it would also welcome any further information that Governments may consider relevant to the topic.[10]

C. Discussion on the obligation to extradite or prosecute held in the Sixth Committee during the sixty-first session of the General Assembly

21. The present section of the second report is based mainly on the document entitled "Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-first session, prepared by the Secretariat".[11] The Special Rapporteur decided to retain the systematic arrangement of this part of the

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[9] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 30.

[10] Ibid., para. 31.

[11] A/CN.4/577. The Special Rapporteur would like to express his gratitude to the Secretariat for its very active assistance in collecting and systematizing materials necessary for the preparation of the present report.

topical summary — together with the subheadings used by the Secretariat — through which the views and opinions of the delegations in the Sixth Committee are presented in a much clearer and more transparent manner. Because of the small number of written observations received from States in response to the request contained in chapter III of last year's report of the Commission, the opinions expressed by the delegations in the Sixth Committee gain special importance as a means to present the views of States and their practice concerning the topic in question.

1. General comments

22. During the sixty-first session of the General Assembly, delegations in the Sixth Committee welcomed the first report of the Special Rapporteur and some endorsed the general approach taken in the report. Some delegations were of the view that the Commission should first undertake an analysis of the relevant treaties, national legislation and practice, and it was suggested that the Secretariat could assist the Special Rapporteur in such a task.

2. Scope of the topic

23. Support was expressed for the cautious approach advanced in the Commission with regard to the scope of the topic. However, according to another view, the topic should have been part of a broader study on jurisdiction. While it was proposed that the Commission also examine extradition procedures, the opinion was expressed that it should not undertake a review of extradition law and deportation. Some delegations invited the Commission to examine the related principle of universal jurisdiction, or at least the relationship between the topic and the principle.

24. Other delegations, while recognizing the link between universal jurisdiction and the obligation to extradite or prosecute, were of the view that the Commission should focus on the latter. It was suggested that the question of universal jurisdiction and the definition of international crimes deserved to be considered as separate topics. It was also proposed that the Commission examine the relationship between the obligation to extradite or prosecute and the principles of State sovereignty and human rights protection.

3. Customary law nature of the obligation

25. It was suggested by some delegations that the Commission should determine whether the obligation to extradite or prosecute had become part of customary international law. Should that be the case, the Commission would need to specify the offences to which the obligation would apply. It was also remarked that the customary nature of the obligation would not necessarily follow from the existence of multilateral treaties imposing such an obligation.

26. The opinion was expressed that the principle *aut dedere aut judicare* was not part of customary international law and that it certainly did not belong to *jus cogens*. In any event, it was observed that if the obligation had become part of customary international law, that would be true only in respect of a limited number of crimes.

27. According to another view, the principle *aut dedere aut judicare* had started to shape States' conduct beyond the obligations arising from international treaties with regard to the most heinous international crimes. It was also believed that in certain

areas, such as counter-terrorism, the obligation to extradite or prosecute was accepted by the whole international community.

28. It was further suggested that the Commission should concentrate more on the progressive development of international law, which could be an alternative solution if the codification process could not find sufficient substantial background in applicable customary rules.

4. Scope and content of the obligation

29. A number of delegations expressed support for the approach taken by the Special Rapporteur, according to which the obligation to extradite or prosecute gave States the choice to decide which part of the obligation they were willing to fulfil. However, the point was also made that the obligation to extradite or prosecute presupposed a choice that did not always exist in practice. In that respect, it was suggested that the Commission consider situations in which a State could not or did not extradite an offender. It was considered that the obligation to extradite or prosecute presupposed the presence of the suspect in the territory of the State. It was also observed that the Commission should offer guidance to States as to whether they should extradite or prosecute.

30. The opinion was expressed that the Commission should determine which States should have priority in exercising jurisdiction. In that regard, it was suggested that preference should be given to the State in whose territory the crime had been committed and that priority jurisdiction entailed an obligation to exercise such jurisdiction and to request extradition for that purpose.

5. Crimes covered by the obligation

31. It was suggested that the obligation to extradite or prosecute should be limited to crimes that affect the international community as a whole. In particular, it was considered that the principle would apply to crimes recognized under customary international law as well as serious offences covered by multilateral treaties, such as those relating to the hijacking of aircraft, narcotic drugs and terrorism. It was further noted that the obligation should apply to serious international and transnational crimes, including war crimes, crimes against humanity, genocide, torture and terrorist acts. Moreover, other delegations raised doubts as to the appropriateness of distinguishing, in that context, between crimes recognized under customary international law and crimes defined under treaty law.

32. Different opinions were expressed as to whether the obligation to extradite or prosecute was applicable only to crimes that were covered by the principle of universal jurisdiction, with some delegations favouring that narrower view and others questioning such a limitation. In that context, it was considered that the obligation to extradite or prosecute should first and foremost relate to crimes for which universal jurisdiction already existed.

33. Furthermore, the view was expressed that the obligation to extradite or prosecute should also apply to serious crimes under domestic law that caused significant harm to the State and the public interest of its people. According to another view, crimes that were defined only in domestic legislation should be excluded from the topic.

(a) Link with universal jurisdiction

34. It was noted that the principle of universal jurisdiction was instrumental to the full operation of the obligation to extradite or prosecute. It was also observed that a State might not be in a position to extradite if there was no treaty between the requested and the requesting State or if the requirement of double criminality was not met, there being at the same time an inability to prosecute because of the lack of jurisdiction.

(b) Surrender of suspects to international criminal tribunals

35. Some delegations referred to the surrender of suspects to an international criminal tribunal as a possible additional option to the alternative offered by the principle *aut dedere aut judicare*. While some delegations emphasized the role of international criminal tribunals in that context, other delegations were of the view that the Commission should not examine the surrender of suspects to such tribunals, which was governed by distinct legal rules.

(c) National legislation and practice

36. In providing details on national legislation, some delegations indicated that laws were being or had been passed in order to implement the obligation to extradite or prosecute, in particular with respect to international crimes such as genocide, war crimes, crimes against humanity and torture. However, it was pointed out that some domestic laws on extradition did not provide for the obligation to extradite or prosecute. Other national laws might not allow extradition in the absence of a bilateral extradition treaty, or restrictions imposed upon the extradition of nationals or persons who had been granted political asylum. The extradition of nationals was subject to several limitations relating to the type of crime and the existence of reciprocity established by treaty, as well as the condition that a fair trial should be guaranteed by the law of the requesting State.

37. Attention was also drawn to the existence of bilateral extradition agreements which did not provide for the obligation to extradite or prosecute, and to sectoral conventions on terrorism containing limitations on extradition that could be incompatible with the obligation to extradite or prosecute.

38. It was further observed that reservations to multilateral treaties containing the obligation to extradite or prosecute had been made in line with national legislation prohibiting extradition on political grounds or for crimes which would attract unduly severe penalties in the requesting State, with the exclusion, however, of crimes recognized under customary international law such as genocide, crimes against humanity and war crimes.

(d) Final outcome of the work of the Commission

39. Some delegations observed that the final outcome of the work of the Commission on the topic should be determined at a later stage. Without prejudice to a final decision on the matter, other delegations supported the idea of a set of draft rules.

D. Concluding remarks of the Special Rapporteur on the debate of the International Law Commission and the Sixth Committee on the preliminary report

40. Introducing the preliminary report, the Special Rapporteur stressed that his text was, in fact, a very preliminary set of initial observations concerning the substance of the topic, marking the most important points for further consideration and including a very general road map for the future work of the International Law Commission in the field. It was the intention of the Special Rapporteur to include in the preliminary report as many difficult problems and questions as possible in order to obtain answers and suggestions, first from the members of the Commission and later from the delegations in the Sixth Committee.

41. The members of the Commission and the delegations in the Sixth Committee have taken into account that specific nature of the "preliminary report", and their comments were aimed at the main issues to be considered by the Commission and the Special Rapporteur in their future work on the topic in question. As far as the Special Rapporteur is concerned, those opinions will be of great value and assistance for him in the process of preparation of subsequent reports, in which draft rules concerning the concept, structure and operation of the obligation *aut dedere aut judicare* will be gradually formulated.

42. There was, however, a great variety of opinions, remarks and suggestions expressed by the members of the Commission, as well as by the delegations in the Sixth Committee, during the debate on the topic in question, which dealt both with the substance and the formal aspects of the present exercise, starting with the very title of the topic and ending with the choice of the final form of the result of the work of the Commission in the field.

43. With regard to the title of the topic, although the view was expressed that it should be changed — referring, for instance, to the "principle", instead of the "obligation", to extradite or prosecute — the Special Rapporteur is of the opinion that, at least at the present stage, the current title should be retained. The concept of the "obligation" *aut dedere aut judicare* seems to provide safer grounds for further analysis than that of "principle". It does not exclude, of course the possibility of, or even need for — as was suggested by some members — consideration of the parallel question of the right of States to extradite or prosecute as a kind of counterbalance to the obligation.

44. There was a rather general consensus among the participants in the debates that the scope of the work on the topic in question should be limited as far as possible to, and should concentrate on, the main issues directly connected with the obligation to extradite or prosecute and the principal elements of this obligation, namely, "*dedere*" and "*judicare*".

45. The Special Rapporteur agrees with those suggestions, especially as regards the call for a very careful treatment of the mutual relationship between the obligation to extradite or prosecute and the principle of universal jurisdiction. It seems that the distinction between universal jurisdiction and the obligation *aut dedere aut judicare* should be clearly drawn. In that regard, the Special Rapporteur would like to add that the definitions of "universal jurisdiction" and the "*aut dedere aut judicare* rule" quoted in the preliminary report should be considered only

examples of a possible approach, without any prejudice to the preferences of the Special Rapporteur.

46. A more detailed analysis of the above-mentioned elements of the obligation in question seems necessary, especially as regards "*judicare*", since the scope of the obligation to prosecute binding upon States may be questioned and understood in different ways, even on the basis of existing treaties. When analysing the obligation "to prosecute", it will be necessary to establish to what extent international law, domestic legislation and practice actually impose the implementation of that duty.

47. Furthermore, the obligation of "*dedere*" may also cause some difficulty, as regards, for instance, the possibility raised by the Special Rapporteur (but questioned by one member of the Commission) that the substantive scope of extradition should be extended to the enforcement of a judgement. That possibility and procedure, however, are provided for under certain internal legislations.[12] The Special Rapporteur agrees with the observation that, in the case of crimes covered by the obligation *aut dedere aut judicare*, the application of some limitations traditionally imposed on extradition may raise problems or may even be impossible. Consequently, that question will require careful consideration by the Special Rapporteur and by the Commission. The Special Rapporteur agrees, however, with the view that the Commission should not consider the technical aspects of extradition law and rather should concentrate on the conditions for the triggering of the obligation in question.

48. Moreover, as was correctly noted by members of the Commission, the question of the so-called "triple alternative", raised by the Special Rapporteur in connection with the jurisdiction of international criminal tribunals, should be dealt with very carefully and in a very limited manner. As was, for instance, stressed by some members, the distinction between extradition and surrender to the International Criminal Court should be clearly identified.

49. As regards the suggested form of the final result of the work of the Commission on the topic in question, the majority of the participants in the debate were of the opinion that the most suitable form would probably be that of "draft articles", although it was admitted that it may still be too early to make any definite decision on the matter. However, on the basis of that opinion, the Special Rapporteur, in the reports that he will subsequently prepare, has decided to proceed in the direction of gradually formulating draft rules concerning the concept, structure and operation of the obligation *aut dedere aut judicare*.

50. Another important problem, which was raised by practically all speakers and which seems to have a crucial significance for the final result of the work of the Commission, is that of the legal background of the obligation under discussion. With regard to the proposal made in the preliminary report "to find a generally acceptable answer to the question if the legal source of the obligation should be limited to the treaties which are binding on the States concerned, or be extended to

[12] See, for instance, the Act of 6 June 1997, Code of Criminal Procedure of the Republic of Poland, which in article 593, para. 1, contemplates the possibility of "petitions for extradition by a foreign State of a person against whom criminal proceedings have been instituted for extradition in order to conduct judicial proceedings or enforce the imposition of the penalty of deprivation of liberty". Similarly, article 602 of the same Code also envisages requests of an authority of a foreign State for "the extradition of a prosecuted person in order to conduct criminal proceedings against him, or to execute a penalty or a preventive measure previously imposed".

appropriate customary norms or general principles of law",[13] the response given by the members of the Commission and the delegations in the Sixth Committee was rather cautious, generally recognizing that treaties could constitute a basis for such an obligation, but expressing some doubts as regards its support in customary norms.

51. In connection with the sources of the obligation to extradite or prosecute, one member criticized the separation, in the preliminary report, of the section devoted to international custom and general principles of law from the other one concerning national legislation and practice of States. The Special Rapporteur would like to explain that the latter question was identified separately within the part of the report concerning the sources of the obligation to extradite or prosecute with the intention to stress the importance of national legislative, executive and judicial practice of States in the process of formulation of the obligation in question. Furthermore, as was stressed by another participant in the debate, national laws and practice fill some gaps left by international regulations. It was also observed that the Special Rapporteur should not forget that the topic under study is directly linked with domestic criminal law systems. The Special Rapporteur fully agrees with the latter two observations.

52. The above does not contradict in any way, however, the need for such domestic practice to be present for customary rules of international law to exist, in accordance with article 38 of the Statute of the International Court of Justice. At that stage, in the preliminary report, it was impossible to reflect a full variety of examples of such State practice, a task that — undoubtedly — the Special Rapporteur will have to undertake later.

53. The Special Rapporteur fully agrees with the suggestion expressed by many members of the International Law Commission and delegations in the Sixth Committee that a thorough analysis of the topic in question should take into account international and national judicial decisions to a much wider extent than was done in the preliminary report. Once again, the Special Rapporteur would like to assure members of the Commission that the limited number of examples of judicial decisions described in his report of last year was only due to the preliminary nature of that report, and definitely not his detracting from the importance of those decisions.

54. An overwhelming majority of members of the International Law Commission and delegations in the Sixth Committee took a rather reserved position concerning the recognition, at least at the present stage, of the existence of a generally binding customary obligation to extradite or prosecute applicable to all offences under criminal law. However, they seemed to be supportive of the idea of a more selective approach, namely, the identification of certain categories of crimes for which universal jurisdiction and the principle *aut dedere aut judicare* have already received general recognition from States. A variety of terms is used in international practice to designate such crimes, including "international crimes", "serious international crimes", "crimes under international law", "crimes of international concern" and "crimes against humanity".

55. Bearing in mind this diversification of crimes or offences, the Special Rapporteur agrees with the numerous proposals that such categories of specific

[13] A/CN.4/571, para. 40.

crimes be identified, since they could be considered — because of their conventional or customary nature — as a basis for the possible application of the obligation to extradite or prosecute.

56. It seems to be much easier and more effective to formulate some legal rules, in the form of codification or of progressive development of international law, for the crimes so selected than to do it, in a general way, for all crimes and offences. That does not exclude, of course, the possibility of developing, at a later stage, if so decided by the Commission, rules or principles of a more general character.

57. A majority of the members who participated in the debate agreed with the suggestion, made by the Special Rapporteur in the last point of the preliminary plan of action,[14] that the present exercise should also include an analysis of the relation between the obligation to extradite or prosecute and other principles of international law. Some of those principles were identified and proposed by the Special Rapporteur for comparative consideration in the preliminary report.

58. There was, however, a significant difference of opinion concerning the substantive scope of the principles to be taken into account. It seems that, in general, there was consensus that the principle of human rights protection should be followed during all work on the topic in question and that specific attention should be paid therein to human rights law.

59. The Special Rapporteur agrees with those suggestions, as well as with the more general proposal that the elaboration of possible rules in the field should be limited rather to rules of a secondary character than to an attempt to formulate principles of a primary nature. The Special Rapporteur is full of appreciation for the many friendly warnings received from those members who participated in the debate on how to avoid the numerous traps awaiting him in his future work. He hopes that he will manage to avoid these traps, thanks to the active and friendly assistance of, and cooperation with, other members of the Commission.

60. The Special Rapporteur is also grateful for the general support, received during the debate, for his proposal to submit to Governments a written request for information concerning their practice, particularly the most contemporary, with regard to the obligation *aut dedere aut judicare*. It seems that the questions raised by the Special Rapporteur in paragraph 59 of his preliminary report, and included in the relevant section of chapter III of the report of the International Law Commission on the work of its fifty-eighth session (a chapter that traditionally deals with specific issues on which comments would be of particular interest to the Commission), will finally lead to more complete responses from States.

E. Comments and information received from Governments

61. In response to the specific issues on which comments of States would be of particular interest to the Commission, identified by the Commission in chapter III of last year's report,[15] some States have already sent their written responses, which have been put together by the Secretariat in a special document entitled "The obligation to extradite or prosecute (*aut dedere aut judicare*): comments and

[14] A/CN.4/571, para. 61, point 10.

[15] See para. 20 above.

information received from Governments".[16] As with the "Topical summary" described above,[17] the Secretariat has performed a very useful analytical work, gathering the information received from States in substantive categories.

62. The responses from Governments have been organized by the Secretariat around four clusters of information, concerning:

(a) International treaties by which a State is bound, containing the obligation to extradite or prosecute (*aut dedere aut judicare*), and reservations made by that State to limit the application of this obligation;

(b) Domestic legal regulations adopted and applied by a State, including constitutional provisions and penal codes of criminal procedures, concerning the obligation to extradite or prosecute;

(c) Judicial practice of a State reflecting the application of the obligation *aut dedere aut judicare*;

(d) Crimes or offences to which the principle of the obligation *aut dedere aut judicare* is applied in the legislation or practice of a State.

63. As was mentioned before, a limited number of responses were received from States: as at 1 March 2007, written observations, containing relevant comments and information, had been received from the following seven States: Austria, Croatia, Japan, Monaco, Qatar, Thailand and the United Kingdom of Great Britain and Northern Ireland. Although the amount of information received is rather small, it allows for some observations and comparisons concerning the four clusters mentioned above.

1. International treaties containing the obligation *aut dedere aut judicare*

64. All responding States confirmed their interest in and commitment to entering into treaties, both bilateral and multilateral, which establish an obligation *aut dedere aut judicare*. All responding States, except Austria, presented a rather lengthy list of multilateral treaties, to which they are parties, providing for the obligation *aut dedere aut judicare*.[18] Among those treaties a leading role seems to be played by numerous conventions, both universal and regional, dealing with the suppression and prevention of various forms of terrorism. Some States, such as Austria and Japan, have stressed that they have made no reservations to the relevant multilateral treaties limiting the application of the obligation *aut dedere aut judicare*.

65. In the realm of bilateral treaties a prevailing position is taken by extradition treaties. Some responding States placed particular emphasis on the bilateral treaties containing an obligation *aut dedere aut judicare* (Austria, Monaco).

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[16] A/CN.4/579.

[17] See paras. 21-39 above.

[18] Those instruments are, to a great extent, the treaties and conventions listed by the Special Rapporteur (following a memorandum by Amnesty International) in his preliminary report. See A/CN.4/571, para. 37.

2. Domestic legal regulations

66. The relevant domestic regulations providing for the obligation to extradite or prosecute from some of the above-mentioned seven States were already summarized by the Special Rapporteur in the preliminary report. For instance, Austrian domestic regulations, following the 1803 legislation, includes provisions reflecting the principle *aut dedere aut judicare* in connection with universal jurisdiction.[19]

67. Other States that have presented their observations on their domestic legislations concerning the obligation to extradite or prosecute put special emphasis on the circumstances and conditions for the possible application of that obligation. As was noted, for example, by Monaco, according to its legislation:

(a) The application of the principle *aut dedere aut judicare* is linked closely to the various grounds for refusal of extradition on which the requested State can rely;

(b) The principle *aut dedere aut judicare* is implemented when extradition is refused because of the nationality of the alleged offender;

(c) The principle *aut dedere aut judicare* will be applied only when the Courts of Monaco have jurisdiction over foreigners for offences committed abroad.

68. Finally, some States, for instance, the United Kingdom, declared that they do not have any specific legal regulations concerning the obligation to extradite or prosecute. However, on the other hand, the United Kingdom has several statutory provisions establishing jurisdiction for specified crimes, thus enabling the relevant national authorities to prosecute offences, when there is implementing legislation for the international treaties by which the United Kingdom is bound. Furthermore, domestic legislation allows the United Kingdom to extradite for trial when requested by another party to an international convention and where the conduct in question is covered by the provisions of that convention.[20]

3. Judicial practice

69. There was a very broad range of different answers regarding the judicial practice of States reflecting the application of the obligation *aut dedere aut judicare*. On the one hand, as was stated by the Austrian authorities, the principle *aut dedere aut judicare* plays a crucial role in Austrian practice. On the other hand, Thailand indicated "no" in response to the question regarding judicial practice. Similarly, Monaco has identified no specific judgement concerning the direct application of the principle *aut dedere aut judicare*.

70. In Austria, the Public Prosecutor, on the basis of the relevant provisions of the Austrian Penal Code,[21] has to examine the institution of proceedings in the country if the extradition of a suspect cannot be granted for reasons other than the nature or characteristics of the offence. However, no court decisions instituting proceedings in Austria following the refusal of extradition explicitly refer to the above-mentioned provisions. Therefore, the lack of court decisions seems to weaken the importance of the principle *aut dedere aut judicare* in Austrian judicial practice.

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[19] See A/CN.4/571, para. 44.

[20] See section 193 of the Extradition Act of 2003.

[21] See section 65, para. 1, No. 2, reflecting the principle *aut dedere aut judicare* in connection with universal jurisdiction.

71. Also, in the judicial practice of the United Kingdom, the nature of the obligation to extradite or prosecute was discussed only in the litigation surrounding the extradition of General Pinochet,[22] without any direct reference to the obligation in specific judgements.

4. Crimes or offences

72. The identification of crimes or offences to which the principle of the obligation *aut dedere aut judicare* is applied in the legislation or practice of the above-mentioned States mostly makes no special distinction between certain categories of offences. Consequently:

(a) In Austria, all crimes and offences punishable under the Austrian Penal Code are subject to the obligation;

(b) In Croatia, the obligation *aut dedere aut judicare* is applicable to all criminal offences;

(c) In the Japanese judicial system, the obligation to extradite or prosecute stipulated by the relevant treaties concluded by Japan is implemented on the basis of the Law of Extradition, the Penal Code and other related laws and regulations;

(d) In Monaco, following articles 7 to 10 of the Code of Penal Procedure, the principle *aut dedere aut judicare* may be implemented in various cases, including crimes against State security, counterfeiting, crimes or offences against diplomatic, consular or national premises, and torture;

(e) In the United Kingdom, the principle to extradite or prosecute applies to the following crimes: torture, hostage-taking, certain offences against civil aviation and maritime safety and specified terrorist offences.

IV. Draft rules on the obligation to extradite or prosecute: starting point

A. Scope of application of the draft articles

73. The Special Rapporteur is of the opinion that one of the aims of the second report, as was the case with the preliminary report, is to encourage and continue a discussion in the International Law Commission on both methodological and substantive issues, in particular concerning the scope of the topic.

74. In connection with the scope of the topic, it seems necessary also to decide if special attention should be paid to the link between the principle of universal jurisdiction and the obligation to extradite or prosecute. In particular, in the Sixth Committee, that question was dealt with in different ways by various States — that either demanded joint treatment of those legal concepts or called for their consideration as separate topics.[23]

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[22] See United Kingdom, *Bartle and the Commissioner of Police for the Metropolis and Others; ex-parte Pinochet [2000] 1 AC 61; Bartle and the Commissioner of Police for the Metropolis and Others; ex-parte Pinochet [2000] 1 AC 147;* and *T v Secretary of State for the Home Department [1996] AC 742 (per Lord Mustill).*

[23] See A/CN.4/577, para. 104.

75. Although the comments and information provided by States are still far from being complete and from giving a solid and definite basis for constructive conclusions, it seems possible, already at the present stage, to formulate provisionally a draft article concerning the scope of application of future draft articles on the obligation to extradite or prosecute. That can be done without prejudice to a final decision on the substantive extent of the present exercise, for instance on whether (or not) to include in the draft articles such elements as universal jurisdiction.

76. Taking into account the considerations made in the preliminary and in the present report, the Special Rapporteur would like to suggest the following formulation of that first article.

Article 1
Scope of application

> The present draft articles shall apply to the establishment, content, operation and effects of the alternative obligation of States to extradite or prosecute persons under their jurisdiction.

77. Three elements proposed in draft article 1 could be more closely analysed when formulating a final version of the provision. They are set out below:

(a) The time element — i.e., the extension of the application of the future draft articles to the periods of establishment, operation and production of effects of the obligation in question;

(b) The substantive element, namely, a specific, alternative obligation of States to extradite or prosecute;

(c) The personal element, namely, the persons against whom the above-mentioned obligation of States may be exercised.

78. The Special Rapporteur, in a short survey of those three elements, would like to identify the main problems connected with them, which could become a subject for discussion by the members of the International Law Commission.

1. Time element

79. It is not possible to define the scope of application of the draft articles on the obligation to extradite or prosecute without taking into account the various periods of establishing, operating and producing effects of the obligation in question. Those draft articles cannot be limited exclusively to a presentation of that obligation in a "frozen" form, separate from its origins and the subsequent results of its operation.

80. Consequently, there are at least three specific periods of time, connected with the establishment, operation and effects of the obligation *aut dedere aut judicare*, that possess their particular characteristics, which should be reflected in the draft articles.

81. As regards the period of establishment of the obligation to extradite or prosecute, a matter of paramount importance seems to be the question of the sources of the obligation. Questions connected with the other periods shall be identified later in accordance with the preliminary plan of action contained in the previous report.

2. Substantive element

82. This part of draft article 1 indicates the alternative nature of the obligation *aut dedere aut judicare* — a characteristic which has to be developed in subsequent articles. The specific construction of that obligation is important for its substantive content. In subsequent draft articles, a more detailed analysis of the mutual impact of the form and the substance of the obligation to extradite or prosecute seems to be required.

83. For the purpose of the present exercise, the term "obligation" seems to be more suitable from the legal point of view than the more passive term "principle", suggested by some members of the Commission and delegations in the Sixth Committee.

84. Similarly, some members contested the concept of obligation, favouring the right of States to extradite or prosecute. The question was raised whether the State concerned is obliged, or only authorized, to extradite or prosecute. Even while accepting the formula of an obligation, some members wondered whether that obligation was an absolute or just a relative one.

85. As was already noted in the preliminary report, the Special Rapporteur favoured the concept of "obligation", which is more useful for codification purposes, rather than the other suggested structure of a "principle". The concept of obligation also seems to be more appropriate given the rather generally recognized nature of *aut dedere aut judicare* as a secondary rule and not a primary one.

86. Furthermore, as was mentioned before, in its work on the draft Statute for an International Criminal Court, adopted in 1994, as well as in the process of elaboration of the draft Code of Crimes against the Peace and Security of Mankind, adopted in 1996, the International Law Commission consistently used the expression of "the obligation to extradite or prosecute".[24]

87. It has to be stressed, however, that, even while he endorses the concept of obligation, the Special Rapporteur agrees with the suggestion that the obligation in question, as well as its elements — *dedere* and *judicare* —, should be very carefully analysed, taking into account, for instance, its specific character as a conditional obligation, as was also pointed out by some members of the Commission. That conditional nature seems to be especially noteworthy with regard to the first part of the alternative obligation, namely, extradition.

88. Similarly, even while preferring to deal with the rule *aut dedere aut judicare* first of all in the context of obligations of States, the Special Rapporteur agrees with the observations of some members that in certain situations those obligations may be closely connected with appropriate rights of States, especially concerning the establishment of State jurisdiction over certain persons.

89. The alternative structure, deriving directly from the traditional expression *aut dedere aut judicare*, suggests a choice between "extradition" and "prosecution", although during the debate in the Commission the opinion was expressed that *aut dedere aut judicare* is a conditional obligation and not an alternative one. The Commission has to decide whether, and to what extent, an obligation to extradite or

[24] See notes 5 and 6 above.

prosecute exists, and whether it is an absolute or relative one. There are numerous questions which may appear in connection with that alternative.

90. The first question is: which part of that alternative should have priority in the practice of implementing the obligation by States, or do States have freedom of choice between the extradition and the prosecution of the persons concerned? And, recalling what was said before about the possibility of extradition provided in some legislations not only for the purpose of prosecution but also for the enforcement of a judgement, in practical terms it is possible that a given State may have a chance to exercise both parts of the obligation *aut dedere aut judicare* towards the same person in the same case (albeit in the reverse order: first, *judicare*, and later, *dedere*).

91. The second question is whether the custodial State, which faces the request for extradition, has sufficient margin of discretion to refuse it when it is ready to enforce its own means of prosecution in that case or when the arguments upon which the request for extradition is based appear to be wrongful and contrary to the legal system of the custodial State.

92. The third question is the following: does the obligation *aut dedere aut judicare* include, or does it exclude, the possibility of any third choice? That question has special importance, in particular in the light of the alternative jurisdiction of the International Criminal Court established on the basis of the Rome Statute of 1998. The concept of "triple alternative", considering a possibility of parallel jurisdictional competences to be exercised not only by the interested States, but also by international criminal courts, was already presented by the Special Rapporteur in the preliminary report.[25]

93. There were, however, some opinions expressed in the Commission and in the Sixth Committee that the concept of "triple alternative" should be treated very carefully and within a very limited scope. As was, for instance, stressed by some members of the Commission, the distinction between extradition and surrender to the International Criminal Court should be taken into account.

3. Personal element

94. The obligation of States to extradite or prosecute is not an abstract one, but is always connected with the necessary activities to be undertaken by States vis-à-vis particular natural persons. Either extradition or prosecution in a given case has to be addressed to defined persons.

95. While jurisdiction may be established and exercised vis-à-vis both natural and legal persons, extradition can be used exclusively with regard to natural persons. Consequently, it seems that the obligation *aut dedere aut judicare* may be considered only in connection with natural persons.

96. A further condition for natural persons to be covered under the obligation *aut dedere aut judicare* is that they be under the jurisdiction of the States bound by that obligation "under their jurisdiction". That does not mean, of course, that such natural persons should be physically present in the territory of a given State or in another way be "in the hands" of that State (for example, to be on board aircraft registered in that State).

[25] See A/CN.4/571, paras. 52-54.

97. The terms "under their jurisdiction", proposed in draft article 1, mean both actual jurisdiction that is effectively exercised and potential jurisdiction which a State is entitled to establish over persons committing particular offences. They cover jurisdiction established, or to be established, on various grounds, taking into account that, as was noted in the report prepared by one non-governmental organization, there are in practice:

> Different types of jurisdiction, including the five principles of geographic jurisdiction (*ratione loci*). These are territorial jurisdiction (based on the place where the crime occurred) and four types of extraterritorial jurisdiction: active personality jurisdiction (based on the nationality of the suspect), passive personality jurisdiction (based on the nationality of the victim), protective jurisdiction (based on harm to the forum State's own national interests) and universal jurisdiction (not linked to the nationality of the suspect or victim or to harm to the forum State's own national interests).[26]

98. Furthermore, in connection with the concept of jurisdiction used in the present exercise, it has to be recalled that:

> Three types of extraterritorial jurisdiction should be distinguished: (a) legislative, prescriptive or substantive (the power of a State to apply its own law to cases with a foreign component), (b) executive (the power of a State to perform acts in another State's territory) and (c) judicial or adjudicative (the power of a State's courts to try cases with a foreign component).[27]

99. It seems that for the identification of rules governing the establishment, content, operation and effects of the obligation to extradite or prosecute, the concept of jurisdiction should be applied in its wider form, including all possible types of jurisdiction — both territorial and extraterritorial. Here, the Commission will have to decide precisely to what extent the concept of universal jurisdiction should be used for a final definition of the scope of the obligation *aut dedere aut judicare*. Bearing in mind all those particularities, we may get a better picture of the concept of jurisdiction that we are supposed to deal with in the present report.

100. When talking about the persons who are (actually or potentially) under the jurisdiction of States bound by the obligation to extradite or prosecute, one cannot forget the crimes or offences, to which the obligation is going to extend, committed by the persons concerned (or, at least, which those persons are suspected or accused of having committed). However, the Special Rapporteur is of the opinion that, for the purposes of the elaboration of the provision dealing with the scope of application of the draft articles on the obligation *aut dedere aut judicare*, it is not essential to include any direct remark concerning those crimes or offences in the actual text of draft article 1.

101. It will, of course, be impossible to avoid the question of such crimes or offences being developed in subsequent draft articles, since the problem of those crimes or offences, to which the obligation in question has to be, or could be, applied, was considered as one of the most important matters of the topic by the participants in the relevant debates both in the Commission and within the Sixth Committee. Consequently, in subsequent draft articles, space will be devoted to a

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[26] Amnesty International, *Universal Jurisdiction: The duty of States to enact and implement legislation* (London, September 2001), Introduction, p. 5.

[27] Ibid., chapter I, p. 1.

much more precise identification of the crimes or offences covered by the obligation to extradite or prosecute, on the basis either of binding international treaties or of national legislation and practice.

102. At the same time, the consideration of international customary rules as a possible source of criminalization of certain acts seems necessary and, consequently, so does the extension of the scope of the obligation *aut dedere aut judicare* to such internationally recognized criminal acts. There are, however, differences of opinion concerning whether any acts, and if so what kind of acts, could be recognized as crimes or offences covered by the obligation in question.[28]

103. The Special Rapporteur already highlighted that problem in the preliminary report, with the various proposals made by States and in the legal literature concerning the crimes or offences which could, or should, be covered by that obligation. It is worth noting that, to some extent, such crimes or offences would fall among the crimes subject to universal jurisdiction. The efforts to identify those crimes continue in numerous proposals made by States and in the legal literature.[29]

104. A further proposal may be recalled herein in addition to those already presented in the preliminary report; it is linked to the concept of what are known as "serious crimes under international law" and was referred to in "The Princeton Principles on Universal Jurisdiction" of 2001.[30] According to that proposal, the application of universal jurisdiction to crimes described therein as "serious crimes under international law" would be possible (principle 2(1)),[31] with the potential for extending that jurisdiction to other crimes (principle 2(2)),[32] and with the simultaneous application of the obligation *aut dedere aut judicare* (principle 10(2)).[33]

B. Plan for further development

105. Draft article 1, dealing with the "scope of application of the draft articles", as proposed in paragraph 76 of the present report, has to be accompanied directly by other articles connected substantively and formally with the first one. As usual, in conformity with the approach followed in other drafts elaborated by the International Law Commission, the provision following the initial one will include a definition or description of the terms used for the purposes of the draft articles. Although it would be difficult at the present stage to give a full list of such terms, some of them should simply derive from the proposed text of draft article 1.

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[28] See paras. 31-33, above.

[29] See A/CN/571, paras. 20-22.

[30] *The Princeton Principles on Universal Jurisdiction* (Princeton, New Jersey: Programme in Law and Public Policy, 2001).

[31] "*Principle 2 – Serious Crimes Under International Law*. 1. For the purposes of these principles, serious crimes under international law include: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture." (Ibid., p. 29).

[32] "*Principle 2 — Serious Crimes Under International Law* ... 2. The application of universal jurisdiction to the crimes listed in paragraph 1 is without prejudice to the application of universal jurisdiction to other crimes under international law." (Ibid., p. 29).

[33] "*Principle 10 — Grounds for Refusal of Extradition* ... 2. A State which refuses to extradite on the basis of this principle shall, when permitted by international law, prosecute the individual accused of a serious crime under international law as specified in principle 2(1) or extradite such person to another State where this can be done without exposing him or her to the risks referred to in paragraph 1." (Ibid., p. 34).

106. Consequently, a future draft article 2, entitled "Use of terms", will provide a definition, "for the purposes of the present draft articles", at least of such terms as extradition, prosecution and jurisdiction. It would probably be useful to describe, in a more detailed way, the term "persons", perhaps in connection with the crimes or offences committed by them. It seems that draft article 2 should remain open until the end of the exercise to give the opportunity to add other definitions and descriptions whenever necessary.

107. Another draft article (or even a set of articles) that may already be foreseen at the present stage is connected with a more detailed description of the principal obligation *aut dedere aut judicare*. Although there are still some differences of opinion concerning the issue of whether the obligation has a customary source, there is a rather general consensus as to the fact that international treaties are a more generally recognized source of the obligation to extradite or prosecute.[34]

108. The growing general nature of such recognition seems to be confirmed by a growing number of international treaties — both multilateral and bilateral — and may serve as justification for at least a provisional formulation of a draft article X, stating that: "Each State is obliged to extradite or to prosecute an alleged offender if such an obligation is provided for by a treaty to which such State is a party".

109. That formulation alone cannot serve as sufficient background for the codification of a generally binding customary rule, but the development of international practice based on the growing number of treaties establishing and confirming such an obligation may lead at least to the beginning of the formulation of an appropriate customary norm.[35] On the basis of the information contained in the submissions made so far by States, and of the documentation gathered by the Secretariat, in his next report the Special Rapporteur will try to present a systematic survey of the relevant international treaties, together with a classification of the extent of the obligations contained in them. Various criteria may be identified and applied to such a classification.

110. Starting with the best known, and the most often applied, of the Hague model treaties, based on the formula contained in article 7 of the Convention for the Suppression of Unlawful Seizure of Aircraft, made at The Hague on 16 December 1970,[36] some variants of the application of the model have already been developed and identified in the legal literature.[37]

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[34] See A/CN.4/571, paras. 35-39.

[35] "If a State accedes to a large number of international treaties, all of which have a variation of the *aut dedere aut judicare* principle, there is strong evidence that it intends to be bound by this generalizable provision, and that such practice should lead to the entrenchment of this principle in customary law", C. Enache-Brown and A. Fried, "Universal Crime, Jurisdiction and Duty: The Obligation of *Aut Dedere Aut Judicare* in International Law", *McGill Law Journal*, vol. 43 (1998), pp. 628-629.

[36] United Nations, *Treaty Series*, vol. 860, No. 12325. Under article 7 of the 1970 Hague Convention: "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution."

[37] For more examples, see M. Plachta, "*Aut Dedere Aut Judicare*: An Overview of Modes of Implementation and Approaches", *Maastricht Journal of European and Comparative Law*, vol. 6 (1999), No. 4, p. 360.

111. Moreover, some of the treaties imposing the obligation *aut dedere aut judicare* follow, not the so-called "offence-oriented approach" (as in article 7 of the 1970 Hague Convention, mentioned above), but rather the "offender approach", reflected, for instance, in article 6, paragraph 2, of the 1957 European Convention on Extradition[38] and in the United Nations Model Treaty on Extradition.[39]

112. In any case, if a larger number of treaties incorporating clauses that formulate in one way or another the obligation to extradite or prosecute can be identified as binding for a growing number of States, then a more solid basis can be established for further consideration. Thereafter, the question could also be considered of whether a growing quantity of such obligations accepted by States may be considered justification for the change of quality of those obligations — from purely treaty obligations to generally binding customary rules.

113. Apart from the question of the treaty background for the obligation *aut dedere aut judicare*, there is also another source of interesting suggestions concerning the 29formulation of other subsequent draft articles: the previous observations made by the International Law Commission, which — as was already mentioned in the preliminary report[40] — incorporated the *aut dedere aut judicare* rule in the 1996 draft Code of Crimes against the Peace and Security of Mankind and simultaneously explained the obligation and its rationale.

114. Certain formulations were included in those explanations which could now serve as sui generis directives for possible further draft articles on the obligation to extradite or prosecute. They contain, for instance, quasi-rules such as:

(a) The obligation to prosecute or extradite is imposed on the custodial State in whose territory an alleged offender is present;

(b) The custodial State has an obligation to take action to ensure that such an individual is prosecuted either by the national authorities of that State or by another State which indicates that it is willing to prosecute the case by requesting extradition;

(c) The custodial State has an obligation to take the necessary and reasonable steps to apprehend an alleged offender and to ensure the prosecution and trial of such an individual by a competent jurisdiction;

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[38] United Nations, *Treaty Series*, vol. 359, No. 5146. Under article 6, paragraph 2, of that Convention: "If the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the files, information and exhibits relating to the offence shall be transmitted without charge by the means provided for in article 12, paragraph 1. The requesting Party shall be informed of the result of its request."

[39] Under article 4 (Optional grounds for refusal) of this Model Treaty: "Extradition may be refused in any of the following circumstances: (a) If the person whose extradition is requested is a national of the requested State. Where extradition is refused on this ground, the requested State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person in respect of the offence for which extradition had been requested" (General Assembly resolution 45/116, annex).

[40] A/CN.4/571, para. 10. See also the text of the relevant article of the draft Code reproduced in note 5 above.

(d) The obligation to extradite or prosecute applies to a State which has custody of "an individual alleged to have committed a crime".[41]

115. The Special Rapporteur would like to stress that he is not formally presenting those quasi-rules as proposals for draft articles. They are just still very preliminary ideas regarding the future substance and form of such draft articles. The ideas were once expressed by the Commission, though in a different context, and therefore the Special Rapporteur saw fit to bring them to the attention of the members of the Commission for their comments.

116. At the present stage, the Special Rapporteur would like to confirm that the "preliminary plan of action" that was formulated in 10 main points, as contained in chapter VIII of the preliminary report,[42] remains the main road map for his further work, including the continued gathering and analysis of highly informative materials concerning legislation (international and national), judicial decisions, practice of States and doctrine, collected with the kind assistance of the Secretariat. It should create sufficient background for the effective elaboration of subsequent draft articles.

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[41] See para. 3 of the commentary to article 9 of the draft Code of Crimes against the Peace and Security of Mankind (*Yearbook ... 1996*, vol. II (Part Two), p. 31).

[42] See A/CN.4/571, para. 61.